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No. 88-359

In The

Supreme Court of the United States

October Term, 1988

DALE G. BUTTON AND
GLORIANNA BUTTON,
husband and wife,

Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE
COMPANY and CIGNA INSURANCE COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The respondents are not in agreement with the argumentative, rhetorical questions posed as "issues" in the petition.

If there is any question arguably presented in this case, it is as follows:

> Has the United States Court of Appeals for the Ninth Circuit, applying Arizona law to affirm the judgment entered against the petitioners, departed from the accepted and usual course of judicial proceedings, or sanctioned any such departure by the United States District Court for the District of Arizona, and if so, is the departure so extreme as to call for an exercise of this Court's power of supervision?

LIST OF PARTIES

The list of parties in the petition is complete. The respondents are corporations.[1]

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[1] In compliance with Rule 28.1, Rules of the Supreme Court of the United States, respondents offer the following listing of parent corporatons (all subsidiaries are wholly-owned, and there are no other affiliates):

Connecticut General Life Insurance Company, a Connecticut corporaton:

> Parent corporations: CIGNA Corporation, a Delaware corporation; CIGNA Holdings, Inc., a Delaware corporation; Connecticut General Corporation, a Connecticut corporation

CIGNA Insurance Company, a California corporation:

> Parent corporations: CIGNA Corporation, a Delaware corporation; CIGNA Holdings, Inc., a Delaware corporation; INA Corporation, a Pennsylvania corporation; INA Financial Corporation, a Delaware corporation

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CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The respondents do not agree that the seventh amendment right to a jury trial is involved in this case[2], but do agree that Rule 56(c) of the Federal rules of Civil Procedure, quoted in the petition, is applicable.

This case also involves the following:

Rule 56(e), Federal Rules of Civil Procedure:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 11(i)(1) of the Rules of Practice for the United States District Court for the District of Arizona:

> Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific portion of the record where the fact may be found (i.e., affidavit, deposition, etc.). Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party . . .

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[2] No constitutional issues were raised in the courts below.

Arizona Revised Statutes, Section 20-1346(A):

> There shall be a provision [in disability insurance policies] as follows: . . .
>
> (b) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description had existed prior to the effective date of coverage of this policy.

Rule 49.2, Rules of the Supreme Court of the United States:

> When an appeal or a petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

STATEMENT OF THE CASE

As this brief is prepared, respondents have not received notice of a request for certification of a record, nor do respondents believe that reference to a record is necessary to an understanding of the case. The essential factual and procedural background is set forth in the opinion of the court of appeals.

Except for its argumentative surplus, the statement of the case contained in the petition is correct in its statement of procedural history. It suffers, however, from glaring errors of omission.

First, the petition does not mention the policy paragraphs that were the legal basis for the decisions below. Those paragraphs, quoted completely by the court of appeals, slip opinion, p. 5, addressed the foundational

underpinning of this case, in which disability resulted from the combined effect of both sickness and accident. The first paragraph, entitled "Total Disability Defined," referred to disability from "accident" as one resulting from accident "directly and independently of all other causes." The second, entitled "Certain Disabilities Deemed Sickness," provided that a disability would be deemed to result from sickness if it resulted "from injuries caused or contributed to by disease," or if it resulted "from disease or infection . . . whether the disease or infection [was] the proximate or a contributing cause of the loss." The effect of these provisions was, as summarized by the court of appeals, "In order to receive lifetime benefit payments, Button's disability must be the result of an accident *independent of all other causes*." Slip opinion, p. 6, emphasis added.

The petition also fails to mention the uncontroverted factual basis for the decisions below. The respondents' motion for summary judgment was prepared in accordance with the district court's local rule 11(i)(1), quoted verbatim above, and alleged:

> H. That plaintiff's disability subsequent to the December 1979 accident was not "a result directly and independently of all other causes of accidental bodily injuries" . . .
>
> I. That the injuries sustained by plaintiff on December 16, 1979, were "contributed to by disease."

These allegations were supported by references to the deposition testimony of plaintiff Dale Button and his physician, Dr. Richard Toll.

The pertinent testimony of Mr. Button was that he had an extensive history of back problems and pain

beginning in the 1960's, including hospitalization in traction in 1976 and repeated episodes of pain during the two years immediately preceding the accident. Dr. Toll's testimony, quoted in part in the first footnote to the Ninth Circuit's opinion, was that Mr. Button had suffered from degenerative disc disease since his teen-age years[3], and that this disease had contributed to the injury and disability.

In their written opposition to the motion for summary judgment, the petitioners simply stated that they "disputed" paragraphs H and I of the statement of facts, quoted above. They presented no affidavits. Nor did they refer to any deposition testimony, interrogatory responses, or any other part of the record to contradict the cited testimony. They conceded the truth of Dr. Toll's testimony, and agreed that the Mr. Button's accident had "triggered his dormant back condition." Plaintiffs' memorandum in opposition to motion for summary judgment, p. 10, l. 5.

The petitioners also made legal arguments. They argued that the "incontestability clause" of the policy, mandated by Arizona Revised Statutes §20-1346(A), precluded classification of the disability as one resulting from sickness, that the respondents had acted in bad faith, and that the respondents were estopped from terminating benefits because of their failure to notify the petitioners that the disability had resulted from sickness.

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[3] According to the petition, Mr. Button was 37 years old at the time of his injury in 1979. According to Dr. Toll, Mr. Button had suffered from degenerative disc disease since 1959, i.e., age 17 or 18.

The district court agreed that the fact of concurrent causation was undisputed, applied Arizona law disposing of the petitioners' other legal arguments, and entered summary judgment in favor of the respondents. The court of appeals affirmed the judgment, and the petitioners have now filed a petition for certiorari within the time limits prescribed by 28 U.S.C. §2101(c).

ARGUMENTS

(Reasons for Denying the Writ)

I

This case involves no federal question of public importance that would warrant review through a grant of certiorari.

Rule 17.1 of this Court contains a clear message that the writ of certiorari will be issued only where there are special and important reasons. *Fay v. Noia*, 372 U.S. 391, 436 (1963). As Chief Justice Taft once cautioned in a unanimous opinion of this Court:

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case presents no issues of public importance that would warrant review on certiorari. This is a diversity case governed entirely by the substantive law of the State of Arizona. In the lower courts, the primary legal issue

was determined by simple application of state law principles established by prior opinions of the Arizona Supreme Court. On its undisputed facts, the case fell squarely within the paramenters established by the Arizona court's decisions defining "disease" as including Mr. Button's degenerative disc disease, *Dickerson v. Hartford Accident and Indem. Co.*, 56 Ariz. 70, 76-77, 105 P.2d 517, 520 (1940), and holding that an accident could not be considered the sole cause of a loss concurrently caused by an existing disease. *New York Life Ins. v. Greber*, 55 Ariz. 261, 263, 100 P.2d 987 (1940).

No significant federal issues were raised in the courts below. In its entire opinion, the Ninth Circuit made only two brief statements of federal law, as follows:

> This diversity case is governed by the substantive law applicable in the forum state. As such, Arizona law is controlling. Slip opinion, p. 5, citing *Strassberg v. New England Mutual Life Ins. Co.*, 575 F. 2d 1262 (9th Cir. 1978)
>
> Because this narrow question [the effect of the incontestability clause] has not been previously passed upon by the Arizona courts nor by this court, we must make "a reasonable determination, based upon such recognized sources as statutes, treatises, restatements and published opinions, as to the result that the highest state court would reach if it were deciding the case." Slip opinion, p. 10, quoting *Molsbergen v. United States*, 757 F.2d 1016 (9th Cir.) cert. dismissed, 473 U.S. 934 (1985).

These unremarkable statements of federal law are not mentioned in the petition. Instead, petitioners have asserted that the Ninth Circuit's decision means that "havoc will be wrought upon the uniform and equitable

system of civil procedure." Despite that assertion, however, petitioners have not even attempted to identify a single error or misstatement of federal law, procedural or otherwise, in the opinion of the court of appeals. In fact, petitioners correctly note that the opinion made no mention of the federal standards for determination of summary judgment motions. Petition, pp. 7-8.

The opinion does not depart at all from established principles governing determination of motions for summary judgment. It sets no new precedent. It contains no unusual statements of law that would permit district courts to "weigh" conflicting evidence in determining motions under Rule 56 or otherwise to depart from usual procedural standards. Petitioners' dire claims to the contrary are merely claims that the well-established law correctly stated in the opinion was incorrectly applied in this individual case. Those claims are wholly unfounded, but even if they were not, they would not justify a grant of certiorari by this court.

II

The case was correctly decided with a fair and just result.

The petitioners' claims of legal error in the courts below are impossible to follow and difficult to answer. The petitioners, for instance, accuse the court of appeals of acting "as a trier of fact" simply for noting that "the determining factor here is causation." Petition, p. 7. Given the language of the policy, it is difficult to imagine how that statement could be disputed. It is so obviously true that any effort to classify it as a "legal" or "factual" conclusion would be frivolous.

The petition repeatedly asserts that there were genuine issues of material fact, then purports to identify four such issues. Petition, p. 10. Three of those are legal issues, not factual, and were either treated as such and disposed of in the lower courts or recognized as irrelevant. The only factual question identified, that of concurrent causation, was undisputed. Even in this court, the petitioners have not identified a single piece of evidence suggesting that Dale Button's back injury was independent of his degenerative disc disease. Petitioners apparently believe that the abstract suggestion of disputed facts precludes summary judgment, or that a genuine factual dispute is created by their simple assertion that they "dispute" the facts. Rules 56(e) of the Federal Rules of Civil Procedure and 11(i)(1) of the district court's local rules clearly provide otherwise. A plaintiff may not avoid summary judgment merely by denying the truth of the defendants' evidence, but must affirmatively produce significant probative evidence that supports the complaint and could reasonably lead to a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968).

At another point, the petitioners assert that, "The linchpin factual issue in Mr. Button's suit . . . [was] whether any pre-existing back condition disabled him prior to the injury." Petition, p. 11. This inexplicable statement, ignoring the language of the policy, is followed by extensive quotation from Justice Cardozo's opinion in *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81 (1930). The quotations do not contain a single statement of law applicable to the issues in this case.

The petitioners' real complaint in this case, however, is revealed by their reliance upon the *Silverstein* opinion. As a matter of Arizona law, any condition "which either has impaired, or presumably will impair, if it continues in its usual course of progress, the normal working of some of the bodily or mental functions" is a "disease." *Dickerson v. Hartford Accident & Indem. Co., supra.* The petitioners nevertheless believe that degenerative disc disease, and presumably other degenerative conditions that afflict large numbers of persons, should not be regarded as disease or sickness for purposes of construing disability insurance policies.

In their zealous advocacy of such a theory, petitioners have overlooked the substantial benefits of Arizona's definition of disease. Disability insurance policies generally provide benefits for disability resulting only from accident or sickness. If degenerative conditions were excluded from the definition of sickness, persons who became disabled as a result of such conditions, without also suffering accidental injuries, would be entitled to no benefits whatever under their policies. The petitioners' distaste for the *Dickerson* definition stems solely from the peculiar facts of this case, in which Dale Button did suffer accidental injuries. If he had not, and had become disabled solely as a result of his degenerative disc disease, their "still, small voice" would instead be loudly defending the broad definition of disease adopted by the Supreme Court of Arizona.

CONCLUSION

The suggestion that this case involves any substantial issue of federal law worthy of consideration on certiorari is preposterous, and respondents respectfully request that the writ be denied.

Respondents further respectfully request that an amount equal to their costs and attorneys' fees incurred in opposing the petition be awarded to them as damages under authority of Rule 49.2, Rules of the Supreme of the United States. There is nothing here which would reasonably support a belief that cetiorari should or would be granted to review a case so totally devoid of federal issues. In addition, the petitioners' blatant omission of both the factual and legal bases for the decisions of the lower courts and their repeated misstatements of the determinative state questions demonstrate that the petition is not only frivolous, but brought in bad faith as well. An award of fees and costs is clearly appropriate.

RESPECTFULLY SUBMITTED this 21st day of September, 1988.

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